Supreme Court of the United States.

OCTOBER TERM, 1876.

No. 19.

JOHN G. BLOUNT *vs.* R. C. WINDLEY.

BRIEF FOR THE DEFENDANT.

S. F. PHILLIPS,
For Defendant in Error.

Judd & Detweiler, Printers.

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The case upon the record is—

In March, 1866, the State of North Carolina passed an act (see Brief for Plaintiff in Error, p. 4) authorizing banks to go into liquidation, by means of a petition in equity, filed by their stockholders, under which a commissioner was to be appointed by the court to take the assets and administer them in trust for such creditors as, within a time to be designated by the court, should prove their claims, and after they should be satisfied, then in trust, as to the residue, for the stockholders. Thereupon, in September, 1866, a petition was duly filed on behalf of the Bank of Washington, and the plaintiff appointed commissioner in trust for all creditors who should prove their debts within twelve months thereafter. At September term, 1867, of the same court, the plaintiff, as commissioner, obtained a judgment against the defendant as surety upon a promissory note given to the bank prior to May 1st, 1865. On the 13th of December, 1869, the State of North Carolina passed an act allowing defendants in judgments obtained as above to pay and satisfy the same (excepting costs) with bills of the bank to which the note was originally payable. (See Brief for Plaintiff, p. 9, bottom.) Upon motion, in March, 1872, the

defendant was allowed to satisfy the judgment obtained as above, with bills of the Bank of Washington; and upon appeal this order was approved by the Supreme Court of North Carolina.

Thereupon this writ of error was sued out, and for error various matters were assigned, all however depending upon the suggestion that the above act of 1869, and the consequent judgment by the Supreme Court of North Carolina, impaired the obligation of the contract between the defendant and the plaintiff as representative of the bank.

It is submitted that such contract has not been impaired. The plaintiff was to hold in trust not for all creditors, but for such as should prove within twelve months from September, 1866, and as to there sidue for the stockholders.

The record does not show that any creditors proved their claims as required to make them cestuy que trusts. The *method* (*ratio*) of considering this case, then, is to suppose that there are no such *cestuy que trusts : De non apparentibus et non existentibus, &c.* As the case stands, the only persons interested in the trusts are the stockholders.

The opinion of the learned court below goes further than this, but it is sufficient that the record presents the point just taken, which renders it unnecessary to consider all the positions taken in that opinion. It will also be observed that the record shows that at the time when the order complained of was made, the defendant was a creditor of the bank; not indeed *a cestuy que trust* under the act, but still *a creditor* by virtue of bills of the bank held by him; *and it nowhere appears but that he was then its only existing creditor;* or if not such, that there was not an abundance of assets otherwise to satisfy them. However, it is here submitted that the record shows the existence of no other creditors.

The question then upon the writ of error resolves itself into this: Can a State legislate upon a fund in court belonging to the stockholders of an insolvent bank, so as to give the creditors, or (here) *the creditor*, of such bank a short remedy to appropriate that fund to the satisfaction of his claim? Does such legislation impair the obligation of any contract? If so, what contract, and with whom?

It will be borne in mind that this is the case of a bank in process of liquidation, whose bills had ceased to be currency.

It will be admitted that the act of 1866, together with the order in this case limiting proof by creditors to a period of twelve months, was no contract with the stockholders, forbidding either the Legislature or the court to enlarge that period, even after it had lapsed.

The stockholders held their pending (*secondary*) interests in the fund, subject to any order that the Legislature might choose to make in behalf of those who once had a primary interest therein, subsequently lost by non-compliance with a rule of administration previously adopted by the Legislature.

Such statutory rules of administration are universally liable to amendment or repeal, until some right in third persons *vests* thereunder.

If creditors had proved under the act, it may be that the act of 1869 could not, as against them, have changed the scheme laid down by the act of 1866. This last-named act may have been a contract as to them; but as to the stockholders, considered in relation to the original obligations of the bank, the case is different. It was competent for the Legislature to *open* the original statute at any time, so long as the proceedings in liquidation were pending, and to *restore* the original priority due to obligations by the bank, no matter in whose hands found.

I regard this question as turning virtually upon the relation to the act of 1866, held by those beneficially interested under the assignment made in consequence thereof.

It seems that such must be the test of the question submitted by the plaintiff.

As regards Blount, the statute and assignment of 1866 created no contract. He was merely a piece of legal machinery liable to be dispensed with at any moment, with the result that such removal did not affect persons for whom he was trustee. His interests in the judgment are measured by theirs. His case is not that of one holding for value, except to the extent that the trusts upon which he held constituted value. His appointment *did not at all affect the rights*. (Story, Eq. Jur., § 831.)

In order, therefore, to decide whether the legislation in question, so far as regards this case, is a mere matter of competent administration, or is a violation of contract, it is necessary to analyze the situation of the persons for whom Blount, upon the record, was trustee. It is, in substance, their rights, *not his*, that are concerned.

So soon as the bank went into liquidation it was no longer necessary to make *demand* in order to bring suit upon its notes. The method of subjecting the assets under administration, was defined by the act (including all competent *amendments*) of which the bank had availed itself. It seems that it is competent for legislation to provide that one indebted to a bank may offset such indebtedness by its reciprocal debt to him, and that the principle by which this is competent extends to all sorts of choses in action, including judgments. A State which had no statute of set-off might enact one applicable to debts contracted previously, and this is so even if such debt were due by judgment. The obligation of a contract by judgment does not bind the debtor to a payment *in specie* a whit more than previously did the promissory note upon which (say) it was obtained. The latter of these contracts binds to a payment in specie to all intents and purposes that the former does. If A and B mutually owe one hundred dollars in a State having no statute of set-off, it would be no violation of the obligation

of B to A if under certain circumstances a court of equity refused to allow the latter to use his credit (even when in form of a judgment) for any other end than to satisfy his reciprocal debt. If in such case the legislature intervened to pass a statute of set-off, it seems upon fundamental principles that such proceeding would be competent. Particularly would this be true where the creditor was (in law) dead, and it did not appear that he owed any debt excepting the one tendered in set-off.

In his learned, acute, and elaborate argument the counsel for Blount has omitted to consider the Bank as being a debtor of Windley at the time that the order was obtained. That argument is confined to a consideration of his rights as creditor. As creditor it is said that he had a constitutional right to payment in specie.

Suppose, however, that, as here, whilst the judgment remained unsatisfied its owner became also *debtor* in an equal amount to the party against whom he had judgment, could not the legislature provide *festinum remedium* by which such mutual relation might be ascertained and satisfaction made to both parties. In such case, in point of fact, there is neither debtor nor creditor, and the speediest way of establishing this fact is the best.

The case so supposed is not varied by the circumstance that the debtor to the defendant in the judgment is, as here, merely sole *cestui que trust* of such judgments, its nominal owner being a bare trustee. The legislature in such case would violate no rights by brushing aside all technical cobwebs, and treating with such beneficiary alone. (Crawford *vs.* The Bank, 7 How., 279. See Morse *vs.* Chapman, 24 Georgia, 249.)

This, as it seems, would be proper between any parties, but there is a peculiar propriety in such legislation when *a bank and its stockholders* are the only beneficiaries in the judgment, and the sole reason why the judgment debtor

brings bank-bills instead of specie to satisfy the same is that the bank has previously violated its contract to give him specie for such notes. The question is to be adjudged not upon appearances in the last scene, but upon a consideration of the whole drama.

A creditor-debtor has a right to exact specie from his debtor-creditor only for the difference between the claims, and the time at which and the means by which such difference is to be ascertained is a matter affecting *remedy* and not *right*.

As there is upon the record here no allegation or suggestion even that creditors of the bank had proved within the time fixed by the order, I have not argued the case upon such speculative ground. It is enough to say, as was said by the supreme court of Illinois in Dunlap *vs.* Smith, (12 Ill., 399 :) " The *record* discloses no such case, and it is not for this court to make a case for the plaintiff."

In that case (which is exceptional for the eminence both of the counsel and of the gentlemen who gave judgment, as well below as above) the bank in liquidation appeared to have creditors *entitled to share under the proceedings*, and so the court notices the circumstance that the act which allowed the judgment debtors to discharge such judgment in notes of the bank had been passed before the making of the contract upon which such judgment was founded. (See also the arguments in King *vs.* Elliot, 5 Sm. & M., 428.)

In the Hallowell Bank *vs.* Howard, (13 Mass., 234,) it appeared that the bank was a mere trustee for a *bona fide* purchaser of the claim in suit, and so a motion to pay into court its bills was denied. The court, however, speculated as to the case, supposing there had been no assignment, and said that even then the notes must have been reduced to judgment before they could be paid into court as proposed. It is clear that their being reduced to judgment was no compliance with the constitutional provision giving the plaintiff a right to gold and silver. It was only a rule of dis-

cretion to prevent mistakes by the court in passing upon the genuineness of the paper offered, and such rule might be modified by legislation allowing notes to be paid in before judgment taken upon them, especially where, as here, no issue is raised upon their genuineness. Such legislation would be only to give *festinum remedium*—that is, an advancement of *remedy*, and no violation of *right*.

So in Niagara Bank *vs.* Rosevelt, (9 Cow., 409,) it is said that *in general* a bank is "bound by law to accept its own bills in payment." The learned reporter appends a note to the same effect, adding a query, if the bank be *insolvent*. He means, of course, unable to pay its creditors, which does not appear to be the case here.

Again, in Suffolk Bank *vs.* Lewiston Bank, (3 Mason, 1,) the plaintiff had presented notes of the defendant to a large amount at its counter for payment. The latter offered to pay in bills —partly bills of the plaintiff—partly bills of other banks. These were refused, and suit brought. Both banks were still in business. It did not appear that demand had been made upon the plaintiff for its bills so offered in discharge; and besides they amounted only to a part of the debt due the plaintiff.

Judge Story said: "Every bank is bound to pay specie for its bills, and nothing else is a good tender. Every other arrangement is a matter of courtesy, and not of right. The Suffolk Bank was not bound even to have received its own bills in payment, if such bills to the full amount had been (and they were not) offered. It might have been unkind and harsh treatment; but still the law does not compel the Suffolk Bank to receive its own bills in payment of bills which it holds of another bank, *at least not under circumstances like the present.*" What is said here of a case in which bills to the *full amount* of the debt demanded had been tendered is, of course, only speculative, but is admitted to be probably correct under what he speaks of as "circumstances like the present," by which I understand circumstances in

which the plaintiff is still in regular business, and no due demand of payment upon its bills had been made;—*circumstances* therefore in which the defendant had no mutual right of action against the plaintiff.

I have argued this case entirely upon the record, and this contains the only statement of facts made before the court below. It is true that the very able and learned Chief Justice of the Supreme Court of North Carolina has in his Opinion discussed the case upon the supposition that creditors had proved their claims in the proceedings in liquidation. He argues that creditors so proving did not thereby increase the original *consideration* of their contracts with the bank, and therefore that the proceedings in liquidation were as against even them liable to any modification that might seem best to the legislature, so that it left them where the original act of 1866 found them. In order that the Court may see this case as it appeared below, I append as part of my brief, and, if it shall be necessary, of my argument, the report in 68 North Carolina Reports, (p. 1.)

It is proper to add that the defendant was not represented at the second argument below.

S. F. Phillips,
For Defendant in Error.